

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

ROBBIE LYNN NEWBY, #1238216

§

VS.

§

CIVIL ACTION NO. 6:07cv453

DIRECTOR, TDCJ-CID

§

ORDER OF DISMISSAL

The above-entitled and numbered civil action was heretofore referred to United States Magistrate Judge John D. Love, who issued a Report and Recommendation concluding that the above-styled and numbered petition for a writ of habeas corpus should be dismissed without prejudice for failure to exhaust state habeas corpus remedies. The Petitioner has filed objections.

The Report and Recommendation of the Magistrate Judge, which contain his proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration, and having made a *de novo* review of the objections raised by the Petitioner, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct.

The Petitioner stated in his objections that he agreed with the overall analysis in the Report and Recommendation, but he had a couple of points of disagreement. He asserted that he exhausted three of his four grounds for relief in his petition for discretionary review. His fourth ground is presently pending in state court in state habeas corpus proceedings. He filed the present petition before a ruling was issued on the fourth ground for relief due to the one year statute of limitations. 28 U.S.C. § 2244(d)(1).

The Report and Recommendation correctly noted that when a petition includes claims that have been exhausted along with claims that have not been exhausted, then the petition is called a “mixed petition,” and the entire petition should be dismissed for failure to exhaust. *Galtieri v. Wainwright*, 582 F.2d 348, 355 (5th Cir. 1978) (*en banc*). There is an exception to this rule concerning previous habeas proceedings in state court, which are not applicable in this case. The present petition is a “mixed petition” and should be dismissed in its entirety. The Court appreciates the Petitioner’s concern about the one year statute of limitation, however, the one year period is tolled during the pendency of state habeas corpus proceedings. 28 U.S.C. § 2244(d)(2). The Petitioner did not need to file the present petition during the pendency of the state habeas corpus proceedings in order to avoid having a petition dismissed as time-barred. The objections lack merit. Therefore the Court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of the Court. It is accordingly

ORDERED that the petition for a writ of habeas corpus is **DISMISSED** without prejudice. A certificate of appealability is **DENIED**. All motions not previously ruled on are hereby **DENIED**.

So ORDERED and SIGNED this 18th day of October, 2007.

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

LEONARD DAVIS
UNITED STATES DISTRICT JUDGE